No. 78-215

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED STEELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 576 F.2d 111.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 24, 1978. A timely petition for rehearing *en banc* was denied on July 18, 1978 (Pet. App. 3a). The petition for a writ of

certiorari was filed on August 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the failure of the trial court to make a pretrial inquiry into the possibility of a conflict of interest arising from the joint representation of petitioner and a co-defendant by the same retained attorney requires the reversal of petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of transporting a stolen motor boat, valued at more than $5000, in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. The evidence at trial showed that on April 30, 1976, Lewis Tallman purchased a 1975 Wellcraft Nova 21-foot motor boat from a commercial distributor in Russells Point, Ohio, for more than $8000 (I Tr. 7-8, 65).[1] While the boat was undergoing repairs for certain defects discovered after the sale was completed, it was stolen from the seller's prem-

[1] "I Tr." and "II Tr." designate the two numbered volumes of the trial transcript. "III Tr." designates the transcript volume marked "Transcript of the Testimony of Theodore Venegar, Emma Lerbforth, Glen Edward Dalton, Mary Crowthers and C. Barry Pickett and Sentence Hearing."

ises sometime in late May 1976 (I Tr. 13-14). The boat was not seen again until July 18, 1976, when Tallman spotted it on Lake Cumberland, near Burnside, Kentucky, in the possession of co-defendant Howard R. Chasteen (I Tr. 15-16, 18-19).[2] When a state police officer arrived on the scene, Chasteen produced registration papers indicating that petitioner was the boat's owner (III Tr. 23-24, 32). It appeared that the manufacturer's serial number on the vessel had been altered, and further investigation disclosed that the boat was Tallman's (I Tr. 9-10; III Tr. 28-29, 34).

A female companion of Chasteen testified that she had accompanied Chasteen and petitioner when they transported Tallman's boat from Ohio into Kentucky in May 1976. She stated that at some point after the completion of the trip, petitioner and Chasteen admitted they were aware the boat had been stolen and asked her to assist them in covering up their involvement (III Tr. 37-38, 44-45).

Both petitioner and Chasteen testified in their own behalf. They testified that petitioner had purchased the boat from an individual who had advertised it in a newspaper. The seller, they said, had followed petitioner in a separate vehicle and had towed the boat from a location in Ohio to the vicinity of Lake Cumberland, Kentucky, where petitioner's father owned a cabin. At the time Tallman discov-

[2] Chasteen was tried jointly with petitioner on the interstate transportation of stolen goods charge. He was convicted and sentenced to a five-year term of imprisonment.

ered the boat, they testified, Chasteen was using it with petitioner's permission (II Tr. 203-205, 230-232).

2. Petitioner and Chasteen were represented at trial by the same retained attorney. The district court was not notified that there was any danger that the dual representation could lead to a conflict of interest on the part of defense counsel, and the court did not conduct an inquiry, *sua sponte*, into the possibility of such a conflict. In affirming petitioner's conviction, the court of appeals refused to adopt a *per se* rule requiring district courts to conduct a hearing in all joint representation cases involving counsel retained by defendants, noting that the instant case "[neither] presented any claim of prejudice [nor] demonstrated that there is a factual basis for a finding of a conflict of interest" (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals erred in not adopting and applying in this multiple representation case a *per se* ruling requiring the district court to conduct a conflict of interest hearing for the purpose of ascertaining on the record whether petitioner knowingly and intelligently waived his right to separate representation.

It is well established that a criminal defendant is guaranteed the right to an attorney whose loyalty is not divided between clients with conflicting interests. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). It is equally established that the right to separate counsel, or to any counsel at all, may be waived. See *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975); *Lollar* v. *United States*, 376 F.2d 243 (D.C. Cir. 1967); cf. *Faretta* v. *California*, 422 U.S. 806, 807 (1975). As we pointed out in our brief in opposition in *Lawriw* v. *United States*, No. 77-1065, cert. denied, April 17, 1978, at 8-10,[3] however, the courts of appeals differ regarding the duty of the trial court to advise defendants of the risks associated with sharing counsel and to make inquiry regarding their waiver of the right to be represented separately. See also *Holloway* v. *Arkansas*, No. 76-5856 (April 3, 1978), slip op. 8. While we believe that the preferable course is to encourage or require a pretrial inquiry, the failure of the trial court to conduct such an inquiry *sua sponte* does not, in our view, automatically entitle a convicted defendant to a new trial.

The fact that petitioner and a co-defendant were represented by the same trial attorney does not in itself constitute a constitutional deprivation of counsel. *Holloway* v. *Arkansas*, *supra*, slip op. 7. In cases in which joint representation is alleged as error on appeal, the court must ascertain whether a conflict of interest or prejudice in fact appears, and while "[o]rdinarily, prejudice would be assumed from

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[3] We are forwarding a copy of our brief in *Lawriw* to petitioner's counsel.

the existence of a conflict, * * * a conflict will not be inferred from the fact of joint representation." *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972).

In the instant case, petitioner has made no claim of prejudice whatsoever; he has shown nothing more than the fact of joint representation. Moreover, the facts of this case do not point to any likely source of prejudice from the joint representation. Petitioner and Chasteen presented the consistent, mutually supporting defense that petitioner was the unknowing victim of a fraudulent sales transaction and that Chasteen innocently borrowed the boat with petitioner's permission. Furthermore, the trial record makes it clear that their retained attorney was zealous in his defense of both defendants, having presented defense witnesses and rigorously cross-examined and attempted to impeach the credibility of the government witnesses. Throughout the trial, defense counsel interposed objections and sought to have the jury admonished as to the limited admissibility—as against one or the other of his clients—of certain testimonial evidence. There is no showing—or even any suggestion—that separate counsel might have taken any steps on petitioner's behalf that his trial counsel failed to take because of his duty to petitioner's co-defendant. Finally, unlike the situation in *Holloway* v. *Arkansas*, *supra*, where the appearance of an actual conflict of interest caused the co-defendants to move for separate counsel, the possibility of conflicting interests was at no time raised

by objection, motion, or representations by counsel or the defendants.[4]

Accordingly, while we acknowledge that joint representation of criminal defendants continues to pose vexing and important questions that will one day require the further attention of this Court, we do not believe that this case, in which there is no evidence of any actual conflict of interest, affords a suitable occasion to address these problems.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The fact that counsel was retained rather than appointed further supports the conclusion that petitioner's decision to proceed with joint representation was knowing and intelligent. *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 (8th Cir. 1970); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976).

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